
amnesty international

UNITED STATES OF AMERICA

Justice delayed *and* justice denied?

Trials under the Military Commissions Act

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The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

US Supreme Court, 1944

Summary

1. Overview: Trials set against a backdrop of unlawful practices Fehler!

Textmarke nicht definiert.

In the “war on terror”, detainees in US custody have been treated as potential sources of information first and potential criminal defendants a distant second. Now, more than five years after detentions began, trials of a selected few detainees, plucked from years of secret or virtually incommunicado detention and interrogations, are looming.

These trials cannot be divorced from the context in which such proceedings would occur. This context is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. A thread through the “war on terror” has been the pursuit of unchecked executive power and efforts to keep detainees captured and held outside the USA away from the ordinary courts. Under the government’s war paradigm, judicial consideration of *habeas corpus* petitions from “unlawful enemy combatants” is seen as unwarranted interference in military operations. In the absence of this basic safeguard against enforced disappearance, arbitrary detention and torture, such violations have occurred.

The government has also rejected the federal courts as the forum in which to bring any such detainees to trial. Instead, military commissions have been developed to fit the policy framework. Under the Military Commissions Act (MCA), signed into law on 17 October 2006, the government may introduce evidence while keeping secret the methods used to obtain it. The military judge can close the proceedings in order to prevent the disclosure of classified intelligence activities. The right to trial within a reasonable time, guaranteed in US federal courts and courts-martial, is denied to “unlawful enemy combatants”. Indeed, a previously secret 2003 Pentagon report on interrogations advised that not only the openness of military commission trials, but also the timing of the prosecutions themselves, would have to be weighed against “the need not to publicize interrogation techniques”. When prosecutions are eventually brought, coerced evidence will be admissible.

At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt, including on the part of the President, who is given the power under the MCA to establish the commissions and act as final clemency authority. Among the defendants will be victims of enforced disappearance, secret detention, secret transfer (rendition), torture or other cruel, inhuman

or degrading treatment. Their treatment has not only been arbitrary and unlawful, it has been highly coercive in terms of the interrogation methods and detention conditions employed.

The USA faces challenges in bringing to trial anyone whom there are grounds to believe has been involved in acts of transnational terrorism. However, a detainee's right to a fair trial – to be able to effectively challenge the state's evidence in a trial conducted within a reasonable time in a court that has jurisdiction over both defendant and crime – should not be prejudiced by any unlawful treatment to which the defendant or any other detainee has been subjected.

These military commissions will be convened following a trail of illegality, with those to be tried arbitrarily detained and ill-treated for years, and under the flawed provisions of the MCA and procedures in the Manual for Military Commissions (MMC). Given this context, Amnesty International does not believe that the trials will meet international standards of fairness. Indeed, at least in the cases of some detainees, perhaps a majority of the 24 identified at the time of writing as potential defendants (listed in Appendices 1 and 2), the organization questions whether the commissions will be competent – in the sense of having the jurisdiction under international law and standards – to conduct trials at all.

2. Fair trial standards do not evaporate in 'war'Fehler! Textmarke nicht definiert.

The USA has used its global war paradigm to remove "alien unlawful enemy combatants" from the protections not only of the US Constitution, but international human rights law, including the fair trial standards enshrined in the International Covenant on Civil and Political Rights. It maintains that its activities outside the USA in the "war on terror" are exclusively regulated by the law of war, as it defines it. This contradicts the views of the International Court of Justice, the UN Human Rights Committee, the UN Committee against Torture, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, and the International Committee of the Red Cross, among others.

Not only has the MCA in effect endorsed the war paradigm, it has backdated the "war" to before 11 September 2001 to allow the prosecution of individuals by military commission for crimes committed before that date. The US government has suggested that the setting up of military commissions will allow the prosecution of individuals for acts that did not violate US criminal laws at the time they were committed, in potential violation of a non-derogable provision of international law. Application of the war paradigm also raises questions of the inconsistent or arbitrary application of trial rights given the USA's intention to try individuals before military commissions for their alleged involvement in the same or similar crimes for which the US government has already tried others in federal court. These crimes include the bombing of the US embassies in Kenya and Tanzania in 1998, the bombing of the USS Cole in Yemen in 2000, as well as the attacks in the USA of 11 September 2001.

The US authorities have indicated that they may turn to civilian prosecutors in some instances in military commissions because the experience gained by the Justice Department "in some of the earlier terrorist cases would make it logical for them to be part of a prosecution team". Thus, when the government decides that it is favourable to its objectives, it may turn to components of the criminal justice system, while denying that the system itself can be the appropriate forum for prosecutions. The defendant, by contrast, is denied the opportunity to seek the protections of the criminal justice system. Instead he must rely on the military commission process with its rules both unfavourable to the fair administration of justice and generating concern that the process has been developed to "launder" human rights violations and to facilitate trials that would otherwise have been jeopardized by government misconduct.

3. One size fits all? The right to a 'competent' tribunalFehler! Textmarke nicht definiert.

3.1 Individuals detained in international armed conflictFehler! Textmarke nicht definiert.

3.2 Individuals detained in non-international armed conflictFehler! Textmarke nicht definiert.

3.3 Civilians detained outside zones of armed conflictFehler! Textmarke nicht definiert.

3.4 No military trials for those detained as childrenFehler! Textmarke nicht definiert.

The right to a trial before a competent tribunal requires that the tribunal has jurisdiction over both the individual and the offence in question. If a defendant is tried by a tribunal that does not have jurisdiction over them or the crime, the trial cannot be fair.

Under the MCA, both the category of individuals and the offences that fall under the jurisdiction of commissions are over-broadly defined. The offences could include any number of actions unrelated to international

or non-international armed conflict. The individual need not have been engaged directly in armed hostilities, or to have been near a zone of international or non-international conflict.

The question of the competence of military commissions arises as a result of the USA's attempt to squeeze anyone it labels as "alien unlawful enemy combatant" into the jurisdictional remit of the commissions. Not only is this status unrecognized in international law, the detainees comprise individuals taken into custody in different locations and circumstances, governed by varying legal regimes under international law. They include people captured in international armed conflict who should have been presumed to be prisoners of war unless a promptly convened competent tribunal decided otherwise; civilians taken into custody outside of zones of armed conflict; and some who were detained when they were children.

It is now nearly five years since the international armed conflict in Afghanistan ended and became non-international. Amnesty International believes that the failure of the USA to provide those detained during the international conflict with prompt adjudication of their status by a competent tribunal -- including David Hicks and Salim Hamdan, now facing charges under the MCA -- rendered their detention arbitrary, in violation of international human rights law. In the absence of such determinations, their presumed status as prisoners of war would render their trials by commission unlawful under the Geneva Conventions.

Five of the 10 people designated for trial by military commission under the Military Order of November 2001, and likely to be the first charged under the MCA, were originally detained in Pakistan. There was no state of international or non-international armed conflict in or between Pakistan and the USA. The 14 individuals transferred in September 2006 from secret CIA custody to military custody and possible trial in Guantánamo are all believed to have been captured outside zones of armed conflict, including Pakistan, Thailand and United Arab Emirates. Other detainees currently in Guantánamo were captured in countries that have included Pakistan, Bosnia-Herzegovina, Mauritania, Gambia and Egypt.

Amnesty International considers that, under international law, such individuals should always have been treated as criminal suspects, and therefore subject to international human rights law and principles of criminal law. The organization believes that they should not be tried in front of military tribunals of any kind. Having examined the jurisprudence of the UN Human Rights Committee and regional human rights bodies, the UN Special Rapporteur on the independence of judges and lawyers has maintained that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism runs counter to all international and regional standards and established case law.

In March 2007, Omar Khadr was facing charges under the MCA. This Canadian national is accused of offences committed in 2002 during the armed conflict in Afghanistan when he was 15 years old. The USA has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Under its provisions, in the case of children held because they participated in the international or non-international armed conflict in Afghanistan, the USA has an obligation to provide them with "all appropriate assistance for their physical and psychological recovery and their social reintegration". Detaining children in indefinite military custody in Guantánamo Bay cannot meet this obligation. Neither can trying such individuals in front of a military commission.

4. The right to an independent and impartial tribunal Fehler! Textmarke nicht definiert.

The independence and impartiality of the tribunal is essential to a fair trial, indeed is so basic as to be an absolute right that may suffer no exception. The fact that there is no civilian component to the military commissions raises concern as to whether they can meet the requirements of independence and impartiality.

The MCA provides for a military judge – a serving officer of the US armed forces on active duty – to preside over each military commission and to decide on questions of law, including the admissibility of evidence. The military judge must be certified as qualified to act as a judge, in accordance with the Uniform Code of Military Justice (UCMJ).

In promoting the military commissions, the US State Department has suggested that the judges in a military system are more independent and less political than federal judges. Nevertheless, in the USA, unlike the ordinary trial-level federal courts, military tribunals, whether courts-martial or military commissions, are part of the political branches, rather than the judicial branch of government (Article III of the Constitution). They are established under Article I of the Constitution (the legislative branch), and the decision-makers are under the command authority of the executive. Judges on Article III courts are appointed for life by the President with the "advice and consent" of the Senate. Military judges on Article I tribunals do not have the equivalent independence conferred by security and length of tenure. In 2001, an expert Commission pointed to a critical

need to increase the independence of military judges by establishing fixed terms of office for them. Its recommendation was not adopted.

The other members of the military commission – at least five, but 12 if the case might result in the death penalty – would be members of the US armed forces on active duty. They would decide questions of fact. The Secretary of Defense's designee, the convening authority, is the person who appoints to military commissions members of the US armed forces on active duty. Amnesty International is concerned that the convening authority's overarching role in the selection of commission members creates a condition of real or perceived lack of independence from the executive.

The executive continues to control the detention universe in which the detainees find themselves. It can decide when, if ever, to charge the detainees for trial by military commission. If the executive decides not to bring the detainee to trial or to drop the prosecution after the trial has started – whether for lack of evidence or for fear that the trial would reveal unlawful government policies – the commission has no say in the continuing detention. The detainee cannot bring a *habeas corpus* petition, either to the commission or to any other court. The absence of a framework of law upon which either the defendant or the commission can draw leaves the defendant's ability to prepare a defence in jeopardy and raises further questions about the independence of the commission.

The military commissions will be called upon to make many decisions which will test the institution's independence and impartiality and public perceptions of this crucial aspect of the trials. Amnesty International is concerned that the military commissions will lack the independence and impartiality necessary to subject to searching inquiry and reject the poisonous fruits of internationally unlawful activities that have been carried out under the 'war powers' of the Commander in Chief of the Armed Forces, the President.

5. Discriminatory application of fair trial rightsFehler! Textmarke nicht definiert.

Only non-US nationals will be tried by military commission. Indeed, promoting the MCA, the White House emphasized that "Americans cannot be tried by the military commissions the administration has proposed. Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."

If the US authorities constitute a tribunal which hands down to a foreign national standards of justice which are inadequate and lower than a US citizen accused of the same offence would receive in an already constituted court, the trials before it would fail to meet the test of fairness; they would clearly be discriminatory, in violation of international law.

As under the November 2001 Military Order, there are signs that the decision-making process determining whether and when people are to be charged for trial by military commission may be influenced by the position adopted by the detainee's home government. In a detention and military commission system already marked by arbitrariness, discrimination, and lack of independent judicial involvement, any such disparate treatment would suggest another dimension to such flaws. Whether a defendant is brought to trial and whether that trial is fair should not depend on the state of diplomatic relations between his government and the government that is detaining him. In full equality, regardless of national origin, all detainees facing criminal charges have the right to a fair trial within a reasonable time conducted in accordance with international law and standards.

6. Damage done: Right to presumption of innocenceFehler! Textmarke nicht definiert.

Once again the backdrop against which these trials will occur cannot be ignored. Although the MCA provides that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt", the right of all those detained in Guantánamo and elsewhere to be presumed innocent, including the 14 men transferred from secret CIA custody to Guantánamo for the stated purpose of trial by commission, has already been systematically undermined by a persistent official commentary on their presumed guilt, including by the President (the Commander in Chief of the Armed Forces), the official given the authority under the MCA to establish the commissions and act as final clemency authority in any case. The prejudicial commentary contrasts with official comments in cases of alleged war crimes and human rights violations committed by US troops.

7. A fiction: The right to trial within a reasonable timeFehler! Textmarke nicht definiert.

Under international law, persons who are detained pending trial on criminal charges must be tried within a reasonable time or released pending trial. Furthermore, international law requires that proceedings in criminal cases be completed without undue delay. This right is also recognized in the Sixth Amendment to the US Constitution. The right to a speedy trial under the UCMJ stems from the Sixth Amendment right, and is similarly seen as essential to protecting the “command and societal interest in the prompt administration of justice”. If the accused is denied his or her constitutional right to a speedy trial, “the only possible remedy” is dismissal of the indictment and release of the detainee.

The question arises as to how the right to a trial within a reasonable time fits into the detention regime developed by the US government. After all, the question of trials has been turned into a peripheral issue by this detention regime, demoted by the priority given to intelligence-gathering and protection of national security as the stated purposes of detention.

The MCA makes no provision guaranteeing the right to trial within a reasonable time. Indeed, the Act expressly states that “any rule of courts-martial relating to speedy trial” under the UCMJ “shall not apply to trial by military commission”. Nevertheless, there are some guidelines for timing in the MMC.

If the speedy trial procedures, such as they are, are violated, the military judge has the power to dismiss the charges against the detainee. However, even if the judge were to dismiss the charges with prejudice to the government, the remedy that would be available to someone charged with a criminal offence in the USA – release from custody – is unavailable to the “alien unlawful enemy combatant”. In his case, the government could simply return him to indefinite detention. Indeed, even if a detainee is tried by a military commission and acquitted, he may be returned to indefinite detention. Clearly, the right to a trial within a reasonable time in such a case would have little meaning to the individual in question, and have done nothing to meet society’s interest in the prompt and fair administration of justice.

8. The right to counsel before, at and after trial

Everyone arrested or detained - whether or not on a criminal charge - and everyone facing a criminal charge - whether or not detained - has the right to the assistance of legal counsel. Everyone charged with a criminal offence has the right to defend him or herself in person or through a lawyer.

Detainees held in Guantánamo have been interrogated prior to their transfer to the base, including in Afghanistan or other countries, and by US agents and agents of other countries. Five years ago the USA began the process of interrogating detainees in Guantánamo with a view to possible prosecution. A previously secret 2003 Pentagon report noted that the government intended to use detainee statements in support of prosecutions.

Despite the use of "aggressive" interrogation techniques for possible prosecutorial purposes, no detainee was or has been provided legal representation during interrogations. By March 2007, the 14 detainees transferred six months earlier from secret CIA custody for the stated purpose of trial still had no access to legal counsel. Indeed, the administration was denying legal representation to the 14 on the grounds that they possess and could relate to counsel details of the secret CIA detention program, including interrogation techniques.

At the same time, the criminal cases against these 14 detainees are being developed by government lawyers. The authorities have said that it will take some time before the 14 cases come to trial because of their complexity. Similar complexity will be faced by the defence, and to deny legal representation even as the prosecution is developing the case is not only to deny the detainee’s right to counsel but to jeopardize his right to adequate time and resources for the preparation of his defence. It constitutes a clear breach of the fundamental principle of “equality of arms”, sometimes referred to as the most important criterion of a fair trial.

The right to a lawyer of choice for detainees charged for trial by military commission is restricted under the MCA. A defendant may retain a civilian lawyer, but would have to bear the cost unless that person offered their services *pro bono*. The civilian lawyer must be a US citizen and have passed stringent security clearance. A defendant is not able to choose as a lawyer a non-US national, for example, a lawyer from his own country. According to the wording of the MCA, even if the defendant retains a US civilian lawyer with the necessary security clearance, he will still be represented by a US military lawyer as associate counsel, even if that goes against the defendant’s wishes.

The right to be defended by a lawyer of one’s choice recognizes the importance of trust and confidence between the accused and their lawyer. This has been heightened in the case of detainees held in Guantánamo where the authorities have reportedly sought to undermine the relationships between detainees and their *habeas* counsel. One possible outcome of any breakdown in trust as a result of such occurrences might be ex-

pected to be that some defendants may choose to represent themselves. If this were the case, it would raise questions of whether such a choice was genuinely voluntary.

A defendant must be mentally competent to stand trial or to represent himself if he so chooses. Under the MCA, the military judge may order a mental examination if there are doubts about the detainee's competence. The matter would then be referred to a board consisting of one or more health professionals who will report on the mental capacity of the defendant. It is not clear who these individuals will be, and whether they will be attached to the military detaining authorities. Again questions of trust may arise. Medical personnel have been involved in the interrogation of detainees in Guantánamo and elsewhere. Amnesty International believes that any medical or mental health evaluation of defendants in the context of military commission trials should be culturally appropriate and conducted by independent health professionals.

9. The right to call and examine witnesses

9.1 Hearsay evidence

9.2 Classified evidence.....

International law requires that a criminal defendant must be allowed to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The location and the circumstances in which the detainees are held, as well as the length of time they have been detained, conspire against the capacity of a military commission defendant to locate and call witnesses who could testify in his defence. The record of the CSRT process also calls into question the willingness of the US military authorities to permit detainees to call witnesses on their behalf.

Some provisions of the MMC give rise to serious concern. For example, a witness whose identity or appearance is classified or otherwise protected from disclosure can be allowed by the military judge to be identified by a pseudonym and to testify from behind a protective screen. The witness would be out of the view of the defendant and his counsel, but within the view of the military judge and the commission members. Amnesty International is concerned that, in the context of military commissions, to the extent that it would be the government that would offer and be allowed to offer such an anonymous witness, the defence would be left considerably impaired in its capacity to assess or impeach the witness's credibility.

The use of hearsay evidence and classified evidence has particular potential to come into conflict with the fair trial right of any defendant to be able to challenge the evidence. In promoting the MCA, the administration explained that the need to resort to such evidence was why the administration favoured military commissions over courts-martial.

Hearsay evidence. The MCA provides for a more permissive use of hearsay than would be allowed in the US federal courts and in courts-martial. Under the MCA, evidence which the military judge determines has "probative value to a reasonable person" is admissible.

Amnesty International believes that hearsay evidence, apart from limited categories and then subject to appropriate safeguards and weighting, should be excluded. Hearsay evidence should never be the sole or principal evidence on which either conviction or sentence is based.

The MCA not only allows the use of hearsay evidence with lower safeguards, the rules in the MMC may actually encourage its use. For example, if there is particular evidence that is "of such central importance to an issue that it is essential to a fair trial", but it is destroyed, lost or otherwise unavailable, the military judge can stop the proceedings, but only after finding that the government was in possession of the evidence and it was lost or destroyed in bad faith. Especially if the judge takes a permissive approach to the loss of evidence, first-hand evidence may thus become second-hand hearsay. The same concern arises in relation to witness testimony. If a witness whose testimony "is of central importance to the resolution of an issue essential to a fair trial" is deemed unavailable, the judge can allow the trial to continue if the government is not responsible for the unavailability. This is a broader standard than exists in courts-martial under the UCMJ.

The administration has accused critics of ignoring the fact that international tribunals allow the use of hearsay evidence. This argument comes from a de-contextualized and selective postulation of international jurisprudence and ignores the fact that the use of hearsay evidence by any international tribunal is part of a whole structure, with its own built-in safeguards and working methods. Any particular procedure cannot simply be plucked from another system and effectively replicated in the military commission process if the structure and other procedures of that process are themselves flawed.

Moreover, in the international tribunals, the finders of fact and law are panels of judges, entirely independent of any government, and expert in international law. In any military commissions convened under the MCA, the finder of law would be a single US military judge whose independence is in doubt. The finders of fact would be US military officers, who may not have the necessary legal training, assigned to the case by the Secretary of Defense or his designee. In addition, unlike the military commissions under the MCA, the international tribunals never have the death penalty as a sentencing option.

Classified evidence. No-one should be convicted of a criminal offence on the basis of evidence that he or she has been unable to see or to challenge effectively. This does not mean that the state does not have legitimate interests in keeping certain information from the public realm, but under international standards, any closure of trial proceedings from the public must be “exceptional”. Amnesty International further stresses that the purpose or effect of any closure of proceedings must not be the removal from public scrutiny of any human rights violations that may have occurred, including enforced disappearance and torture. Closure of proceedings in such circumstances would undermine the integrity of the entire process.

Under the MCA, the military judge may close all or part of the commission proceedings to the public, including upon making a finding that such closure is necessary to “protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities”. This is a matter of potential concern. The CIA’s interrogation techniques, for example, are classified at “top secret” level. On 6 March 2007, the Pentagon announced that CSRT hearings for the 14 detainees transferred from secret CIA detention would be held in closed session “due to the high likelihood that these detainees might divulge highly classified information”. This presumably would be the same at a trial by military commission.

In the military commissions, any classified information “shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security”. If classified information is disclosed to the defence, the military judge can issue a protective order to ensure that it is not made public. Where the classified information is not to be disclosed, the judge may authorize, but only “to the extent practicable”, the deletion of classified parts of documents to be introduced as evidence or their substitution with a summary version or a “statement of relevant facts that the classified information would tend to prove”.

The prosecution may also be permitted to introduce evidence while protecting from disclosure the sources, methods, or activities by which the government acquired it, if the military judge finds that the evidence is “reliable”. An unclassified summary of the sources, methods, or activities may be provided to the defence, but again only “to the extent practicable and consistent with national security”. These provisions also apply to any classified evidence that “reasonably tends to exculpate the accused”. Thus, the defendant may be denied access to some or all government evidence that tends to prove his innocence, if that evidence is classified and it is deemed impracticable to give a summary version of it. The prosecution may object to any examination of a witness or motion to admit evidence by the defence that could lead to the disclosure of classified information, and following such an objection the military judge would take “suitable action to safeguard such classified information”.

Amnesty International is concerned that defendants may face an insurmountable barrier in relation to certain classified evidence used against them. The defence may be denied the ability effectively to challenge classified information or the methods used to obtain it. If deletions, summaries or substitutions are considered impracticable, the defence may be denied the totality of the information deemed classified. Given that US detention and interrogation policies in the “war on terror” have violated international law, this is a matter for particular concern in the context of these military commissions.

10. Use of information obtained by unlawful methods

A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt. Another is that no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment. The MCA neither guarantees these rights nor requires the government to abide by its international legal obligations.

Whatever its origins, the admission of evidence that has been obtained by torture or other cruel, inhuman or degrading treatment is antithetical to the rule of law. When it comes to trials, prosecutors should see themselves as the first line of defence in protecting the integrity of the proceedings by preventing the use of evidence that has been obtained by torture, ill-treatment or other unlawful methods. Given that practices such as

secret detention, secret rendition, and torture or other cruel, inhuman or degrading treatment have been cleared by government lawyers, Amnesty International is not confident that they will be opposed by government prosecutors in the context of military commissions, and is concerned that they may not be subject to the searching inquiries that allegations of such practices would more likely face if raised in criminal trials conducted in the federal courts.

The MCA states that “no person shall be required to testify against himself *at a proceeding of a military commission*”. However, this does not expressly prohibit the admission as evidence of information earlier coerced from the defendant during his years in custody. Indeed, the MCA allows the Secretary of Defense to prescribe procedures under which a statement made by the accused “shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination”. The MCA also expressly allows an oral confession or admission to be “proved by the testimony of anyone who heard the accused make it, even it was reduced to writing and the writing is not accounted for”. No corroboration is required, unlike in trials by US courts-martial.

The MCA prohibits the admission of any statement obtained by the use of torture. However, the USA defines torture more narrowly than under international law. In addition, the MCA would allow the admission of evidence extracted under equally prohibited cruel, inhuman or degrading treatment. The MCA differentiates between statements obtained before 30 December 2005, when the Detainee Treatment Act (DTA) came into force, and statements obtained after that date. This betrays a position that ignores the international legal requirement that any statement obtained under cruel, inhuman or degrading treatment should not be admitted into evidence, regardless of when it was obtained.

Prior to the enactment of the DTA, there were more than four years of extraterritorial detention operations by the USA in the “war terror”. Many thousands of interrogations of detainees took place during this period in Afghanistan, Guantánamo and elsewhere, by agents of the US and other countries. All 10 people charged for trial by military commission under the 2001 Military Order – and likely to be charged for trial by military commission under the MCA – had been detained for more than three years before the DTA came into force. Similarly all of the 14 men transferred from secret CIA custody to possible trial under the MCA in Guantánamo were taken into custody prior to the enactment of the DTA, most of them more than two years before.

The USA’s reservations to international treaties mean that, even with the passage of the DTA, it only considers itself bound by the prohibition on cruel, inhuman or degrading treatment or punishment to the extent that it matches existing US law. Indeed, the Justice Department reportedly considers that constitutional law allows the courts in effect to consider a sliding scale of abuse depending on the context in which it occurs. The wording in the MMC appears to provide scope for the military judge at a commission trial to take this approach.

The military commission system under the MCA leaves the determination as to what constitutes torture and other ill-treatment and whether information extracted under it can be introduced at a trial to the military and the executive authorities. The possible ramification of this for defendants in this process is illustrated by cases in which the military have investigated allegations of torture and other ill-treatment, including under techniques authorized by the executive, and found that they had not been unlawful even when international law had clearly been breached.

Apart from statements by the individual appearing as a defendant before the military commission, evidence obtained through torture or other ill-treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo or elsewhere.

International standards prohibit the state from taking advantage of the situation of a detainee for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. As well as the many explicit allegations of torture or other ill-treatment made by detainees in US custody in Afghanistan, Guantánamo and elsewhere, Amnesty International considers that the conditions in which many of them have been held amount to cruel, inhuman or degrading treatment and are in themselves coercive.

11. The right to appeal and the right to remedy

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal according to law.

Under the MCA, anyone convicted by a commission may have its findings and sentence reviewed by the convening authority. In addition, the Secretary of Defense “shall establish” a Court of Military Commission Review made up of panels of not less than three appellate military judges. The Secretary of Defense will

appoint the judges, including the Chief Judge, to this Court, which would reside within the Office of the Secretary of Defense. Anyone convicted by a commission can appeal to this Court “in accordance with procedures prescribed under regulations of the Secretary of Defense”. This review process would not fulfil the requirements that any appeal court be independent.

The Court of Military Commission Review “may act only with respect to matters of law”, that is, not of fact. The Court may only grant relief if “an error of law prejudiced a substantial trial right of the accused”. The MCA reiterates that the limited right of appeal under the DTA would apply. Under this, the US Court of Appeals for the DC Circuit would only be able to act “with respect to matters of law”, and the scope of its review is limited to consideration of whether the final decision was consistent with the standards and procedures specified by the MCA and, to the extent applicable, the Constitution and the laws of the United States. In addition, the MCA states that the US Supreme Court “may” review decisions of the DC Circuit Court of Appeals if it decides to do so. In the ordinary criminal justice system, the Supreme Court agrees to hear appeals in only a tiny percentage of cases that come before it.

The limitations in scope of appellate review provided under the MCA may fall foul of the requirement of international law. The UN Human Rights Committee has stressed that an appeal solely on questions of law, without the opportunity for the appellate court to conduct an evaluation of the evidence presented at trial is insufficient.

Except for this limited right of appeal, the MCA states that no other “court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever,... relating to the prosecution, trial, or judgment of a military commission..., including challenges to the lawfulness of the procedures of military commissions...”. Given the abuses to which detainees have been subjected during their detentions, this curtailment of post-conviction remedies is a serious problem.

Under international law, a state must ensure that any person whose rights are violated has an effective remedy. This is non-derogable, even in times of emergency. The military commissions, including the appeals process, are part of the universe of irremediableness and discrimination in which the detainees find themselves. The fact that they only apply to foreign nationals, and the fact that the MCA curtails the right of judicial review of the lawfulness and conditions of detentions and the right to remedy for human rights violations, but only in the cases of non-US citizens, renders both the commission process and the law itself discriminatory, in violation of international law.

12. The death penalty is not justiceFehler! Textmarke nicht definiert.

Despite world trends towards abolition of the death penalty, despite the fact that the international community has agreed that capital punishment is not an option even for the worst crimes tried by international criminal tribunals, and despite growing opposition in the USA to the death penalty in the face of evidence of its unreliability and unfairness even under a sophisticated judicial system, the MCA provides for the death penalty for a number of offences after trials of less rigorous standards.

Amnesty International calls on states not to provide information for use in judicial proceedings taking place abroad in any case where the death penalty is being sought or might be imposed, unless they obtain satisfactory guarantees that a death sentence will not be imposed. No such assurances should be accepted as sufficiently reliable in the case of the USA’s military commission trials, given that they operate in a near legal vacuum, and have been preceded by a trail of unlawfulness. Moreover, because of the likelihood of the unfairness of trials under the MCA and the context in which such proceedings would occur, Amnesty International calls on states not to provide any information to assist the prosecution in military commission trials, even in cases where the death penalty is not sought.